United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2328

B
P/S.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 74-2328 et al.

UNITED STATES OF AMERICA,

Appellee,

-v.-

HARRY BERNSTEIN, ET AL.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District Of New York

REPLY BRIEF IN BEHALF OF APPELLANT FLORENCE BEHAR

HENRY J. BOITEL
Attorney for Appellant
Florence Behar
233 Broadway
New York, New York 10007
(212) RE 2-8104

5

INDEX

INDEX

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 74-2328 et al.

UNITED STATES OF AMERICA,

Appellee,

-v.-

HARRY BERNSTEIN, ET AL.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Eastern District Of New York

REPLY BRIEF IN BEHALF OF APPELLANT FLORENCE BEHAR

This Reply Brief will not attempt to restate the extensive treatment of the law and the facts contained in our main Brief. Instead, we will solely address ourselves to specific contentions in the Government's Brief.

To the extent that the government claims that any of the issues presented by this appeal (whether in appellant Behar's Brief or in the briefs of the co-appellants - adopted by appellant Behar), were not properly preserved for review by assigned counsel, it is respectfully urged that the interests of justice require that this Court consider the merits of those

issues, since assigned counsel was forced upon Mrs. Behar in place of counsel of her choice. (F.R.Cr.P., Rules 1, 51, 52).

POINT I

DEPRIVATION OF RIGHT TO COUNSEL; INEFFECTIVE ASSISTANCE OF ASSIGNED COUNSEL; PREJUDICE OF TRIAL JUDGE.*

1. There was no actual conflict of interest; in any event, there was a proper waiver.

The government concedes that the District Court did not question the integrity of Mr. Boitel or Mr. Boitel's claim that he would give Mrs. Behar full and proper representation (Gov. Br., p. 147).** Instead, it is the government's theory that since there was a possibility that conflicting defenses might arise, it was necessary that the Court be satisfied that Mrs. Behar had given a clear and intelligent waiver so as to

---

* Appellant Behar's Brief, Point I, p. 16; Gov. Br., Point 10, p. 136.

With regard to the policy of the State of New York concerning the payment of legal fees by a corporation for the defense of its officers in criminal cases, See: New York Business Corporation Law §§ 723(b) and 724(c).

This Court's most recent opinion with regard to conflict of interest is Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., (September Term, 1974; May 23, 1975), slip sheet ops. at 3669. The issue involved there, however, is unrealted to the issue in the present case.

** If the fact of compesnation created a conflict of interest notwithstanding the integrity, ability and faithfulness of the attorney, then the Court's assignment of counsel did not significantly change the situation. The new attorney was assigned by Judge Travia and Judge Travia was required to pass upon his compensation.

preclude a later claim on her part that her attorney had been inhibited in some way in his conduct of her defense (Gov. Br., pp. 144-6). We said as much in our main Brief, at p. 20. The real issue, according to the government, is whether Mrs. Behar made such a waiver. That she did so is made clear in our main Brief, at pp. 26-28, and see fn. 5. It is also made clear in the Government's Brief at p. 148. However, the government finds sufficient doubt generated by an exchange between Mrs. Behar and the Court as reproduced in its Brief at p. 149. There, Mrs. Behar acknowledged that her waiver was for all time. Then, the questioning went as follows:

> "THE COURT: But at a later date, if I see someone done in - for instance, I think you are not being given the effective assistance, let's use that word - for some reason that might come to mind, do you want me to sit back and do nothing or lean over and tell you 'You're in trouble lady?'
>
> "THE WITNESS: Yes.
>
> "THE COURT: Of course you would want me to do it at that time."

How else could Mrs. Behar or any other client respond to the question put by the Court? Take away the alleged conflict situation and put that question to any defendant during the course of pre-trial proceedings and he would have to give the same answer. Does that mean he does not have confidence in his attorney?

Significantly, the Government's Brief does not indicate that despite the Court's last quoted statement, Mrs. Behar went on to state that she was giving "an unequivocal",

"voluntary", "knowing waiver, yes sir." (C. 224).

2. There was no voluntary withdrawal.

As a second line of argument, the government claims that it was not necessary for the Court to terminate Mr. Boitel's representation since Mr. Boitel had voluntarily withdrawn due to the finding of actual conflict of interest by the Court (Gov. Br., pp. 150-1). As shown by the Court's directives, quoted at p. 30, fn. 7 of our main Brief, there can be no doubt that the Court ordered Mr. Boitel out of the case. It is true that Mr. Boitel sought to persuade Judge Travia to withhold his determination until a ruling could be obtained from the Bar Association. However, the Court responded that the "so-called Bar Association" was not going to have any effect upon the Court's determination (C. 250, 253, 261). The Court would not even permit Mr. Boitel to remain as Mrs. Behar's attorney for the ensuing two days until she either retained an attorney or the Court assigned one for her. Instead, the Court stated "I'll be her lawyer for two days. Nothing will happen to her for two days." (C. 263-4).

3. Prior compensation was not a relevant factor.

As to the question of compensation already received by Mr. Boitel, for services already rendered, the government makes no effort to give any legal or factual justification for the Court's utilization of this factor in disqualifying Mr. Boitel. The government concedes that "understandably, Mr. Boitel was not willing to return these fees,

as a substantial amount of legal work had already been performed by him." (Gov. Br., p. 152). By making the return of such fees, for twenty-two months of work, a condition precedent either to Mrs. Behar's independent retainer of Mr. Boitel or the assignment of Mr. Boitel under the Criminal Justice Act, the Court made it a clear impossibility for Mrs. Behar to have counsel of her choice. Few single practitioners could have complied with that requirement even if otherwise disposed to do so. No rational relationship existed between the prior payment of fees and the fidelity of Mr. Boitel's future conduct.

4. The alleged pre-sentence expression of satisfaction.

The government appears to suggest that the constitutional problems presented by the deprivation of counsel of her choice are in some way alleviated or diminished by an alleged expression by Mrs. Behar, at the time of sentence, that she was satisfied with her trial attorney (Gov. Br., p. 148, fn.; 154). That claim is absurd for three reasons. (1) How can the government seriously assert that Mrs. Behar was incompetent to waive a possible conflict of interest, but was later competent to assess the performance of the attorney who was forced upon her; (2) We invite this Court to examine the minutes of sentence at D. 46. How can the government seriously assert that Mrs. Behar's simple "yes" response to a question put by the Court, in the midst of sentencing proceedings, was a true expression of satisfaction? The very judge who had made

her decisions for her, and who was about to impose upon her all or part of the promised hundred years, was the one who was asking the question. (3) Assigned counsel could have been the best attorney in the world and could have represented her in the best manner possible, but that does not, in any respect, diminish the fact that she was deprived of counsel of her choice, in violation of the Sixth Amendment.

5. The lack of effective assistance.

In a similar fashion, the government seeks to minimize the significance of what occurred in this case after Mr. Boitel's removal (See our main Brief, at pp. 31-33). It urges, for example, that "pinch hitting" of attorneys during the trial was "made with the consent of the defendants involved.", and that it was of no significance that assigned counsel independently represented, in another case, an FHA appraiser from the Hempstead office who was indicted for receiving bribes (Gov. Br., p. 152). The District Court did not, in those situations, go through any elaborate procedures to safeguard the rights of the defendants involved, including Mrs. Behar. Indeed, with regard to the FHA appraiser, although the Court had full knowledge of the matter, it did not even advise Mrs. Behar with regard to that representation (See our main Brief, at p. 32, fn. 8).

Whether or not there was any merit to the trial court's order ousting counsel for Mrs. Behar, she was deprived of the effective assistance of counsel for the reasons set

forth at pp. 31-34 of our main Brief.

POINT II

LENGTH OF TRIAL; MULTIPLE CONSPIRACIES; CUMULATIVE EVIDENCE; SPEEDY TRIAL AND PROMPT DISPOSITION.*

The government argues that, as to Mrs. Behar, there was a single conspiracy. However, it supports that contention only by its own self-serving diagram at p. 63. It does not allege that there was any evidence, direct or circumstantial, that Mrs. Behar had any knowledge of the "Jet" transactions (Gov. Br., at pp. 62-66). It claims, instead, that Mrs. Behar "played an active role in bringing Kapraki into the bribery phase of the conspiracy." (Gov. Br., at p. 67). In fact, the government's evidence concerning Mrs. Behar was solely that she advised Kapraki to give a gratuity to the appraisers and that six such gratuities were given by Kapraki, two to Jankowitz and four to Goodwin. (See: Tr. 3105-9, 6399-6401). Only three of the alleged Goodwin payments resulted in conviction. Thus, the only evidence against Mrs. Behar was both qualitatively and factually different from the alleged briberies concerning the "Jet" properties. The evidence concerning these latter briberies not only substantially extended the length of the trial, but also constituted the most devastating trial evidence of corruption of government officials (Goodwin, Rose Cohen, Cronin and, according

---

* Appellant Behar's Brief, Point II, p. 35; Gov. Br., Points II and III, pp. 61, 79).

to the government's latest contentions in brief, unnamed others within the FHA). There is no evidence in this case that Mrs. Behar was aware or should have known that any corruption was taking place with regard to the assignment, evaluation or re-evaluation of any such properties. At best, if Mrs. Kapraki's testimony is to be credited, Harry Bernstein's requests for particular appraisers were occasionally honored. No implication of a bribery scheme can be drawn from that alleged fact. Nowhere is it shown that Mrs. Behar knew or had reason to know that any regulation or policy prohibited the request for a particular appraiser, or that criminal means were being used to bring about such assignments.

* * *

As to the fairness of the length of the pre-trial proceedings, the government asserts that appellant Behar has failed to make any showing of prejudice (Gov. Br., fn. at 83-4). It is respectfully submitted that eighteen months of pre-trial agony, as well as deprivation of counsel of her choice, represents a clear demonstration of prejudice. The same applies to the length of the trial proceedings, which additionally placed an unconscionable and impossible burden upon the jury. Here, as elsewhere in its Brief, the government ultimately relies upon the proposition that "the jury itself displayed a high degree of conscientiousness and sophistication." (Gov. Br., p. 82). The government's continual reliance upon these alleged qualities on the part of the jury amply demonstrates the heart of the problem in this case. How

can we possibly conclude that the small number of jurors who are able to undertake an assignment in a trial of this length did in fact have the requisite conscientiousness and sophistication? Assuming the presence of both qualities, how can we assume that they had the ability to sort out the massive amount of evidence in this nine month trial? The government's tactic was to portray a vast sewer of corruption for the purpose of persuading the jury that otherwise innocent or equivocal conduct of Mrs. Behar was performed with criminal intent. She should not have been made to bear the weight of the alleged criminal conduct of others as to which she had no knowledge or interest.

* * *

The government has made no effort to respond to our serious argument with regard to the trial court's self-proclaimed abdication of its discretionary power to limit the extent of the government's cumulative proof (See our main Brief, at pp. 41-2).

POINT III

THE FALSE STATEMENT COUNTS OF THE INDICTMENT WERE FATALLY DEFECTIVE.*

We have, for the most part, adopted the arguments of the co-appellants with regard to this issue.

---

* Appellant Behar's Brief, Point III, p. 46; Gov. Br., Point I, p. 48.

However, in our Brief at pp. 46-7, we point out the particular price of the shortcomings of the indictment as regards Mrs. Behar, since the government's theory of liability was predicated upon "conscious avoidance" or "reckless disregard". The government has failed to respond to our argument in this regard. The failure of the indictment to specify knowledge of falsity, or to specify the false statements, clearly rendered it void. That defect carried through to the trial proof, as noted infra, at p. 12.

POINT IV

THE COURT'S CHARGE ON THE ISSUES OF "CONSCIOUS AVOIDANCE" AND "RECKLESS DISREGARD" WAS CLEARLY ERRONEOUS; GUILT WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.*

We would add the following to the arguments of our main Brief. The government asserts that "[S]ince there is no way of knowing whether the jury convicted these appellants on a theory of conscious avoidance or recklessness, the convictions of these appellants on the false statement counts must be reviewed on the basis of the theory of recklessness." (Gov. Br., p. 114, fn.).

The trial court's charge on the theory of recklessness is set forth at C. 512-513. On May 21, 1975, this

---

* Appellant Behar's Brief, Point IV, p. 47; Gov. Br., Points V, VII, pp. 94, 113.

Court reversed the conviction in United States v. Bright, September Term, 1974, slip sheet ops. at 3625. In doing so, this Court held as follows:

> "To put it somewhat differently, it is common ground that negligence alone will not suffice. Nor will a reckless disregard of whether the bills were stolen, standing by itself. Such reckless disregard must be coupled with a conscious purpose to avoid learning the truth. And even if those two tests are in conjunction the jury should still be advised that if they, nonetheless, fail to find that the defendant actually believed that the property was stolen, they should acquit." (slip sheet ops. at 3621).

An examination of the Court's charge on the theory of recklessness (C. 512-513) reveals that the Court omitted any reference as to Mrs. Behar's actual belief. For that reason, the judgment of conviction must be reversed.

In a footnote at p. 122 of its Brief, the government quickly passes over the Court's charge to the jury that it could find that the defendant Behar had an "affirmative duty to insure that statements made in the application were true". The government claims that the trial court later "clarified the nature of the duty" so as to eliminate "any possible confusion as to the meaning of 'insure'." (Gov. Br., fn. at pp. 122-3). This claim by the government is not derived from the facts. As we point out in footnote 2 at page 47 of our Brief: "Even government counsel unsuccessfully requested that the Court correct its charge in this respect (C. 689-70). The Court did give a brief supplemental charge but never rescinded the 'insurer' assertion of

the main charge (C. 709).

As we pointed out in Points III and IV of our main Brief (pp. 46-9), the government, even in its proof, failed to give individualized treatment as to those aspects of each count's false statements which should have been uncovered by Mrs. Behar. If the conscious avoidance theory has any validity within the context of this case, it must certainly be shown which particular false statements would have been uncovered by greater diligence. In place of giving a response to this statement, the government claims that there were enough circumstances present to require Mrs. Behar to send "out an Eastern solicitor to speak to the applicant's supposed employer". In the first place, the Eastern solicitor in charge of Kapraki's applications was Cardona. As the government concedes, "...it was part of his duties to check on the prospective buyers as to whether they were qualified..." (Gov. Br., at p. 28). It is thus clear that the very precaution which the government seeks to impose upon Mrs. Behar - the assignment of a solicitor to investigate - was actually in effect. There is no claim and no reason to believe that Mrs. Behar could have suspected that Cardona was a party to a scheme of falsification. Moreover, nothing in the trial evidence reveals that Mrs. Behar had the authority or responsibility to send other solicitors out to check on the account solicitor.*

---

* The government also asserts that Mrs. Behar gave verification of employment forms to Kapraki in violation of FHA requirements (Gov. Br., at p. 98). Kapraki's testimony was that Mrs. Behar gave her "a few,,,five or six" such forms (Tr. 3280). The

POINT V

THE COURT'S CHARGE WRONGFULLY AND PREJUDICIALLY INSTRUCTED THE JURY THAT IT HAD TO CONVICT MRS. BEHAR BEFORE IT COULD CONVICT CARDONA.*

The government claims that Cardona could not have been a principal since the crimes charged in the false statement counts are specified as having been committed on the date that the application was submitted to the FHA, and that the submission was by Mrs. Behar and Eastern Service Corporation. Therefore, "They, not Cardona, were the principals under this theory."

18 U.S.C. § 2 provides as follows:

Principals.

(a) Whoever commits an offense against the United States or aides, abetts, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by

---

[footnote continued from previous page]
government points to no FHA regulation violated by that procedure (See: Chapter I of the Mortgagee's Handbook, reproduced at D. 2-38). Moreover, Kapraki's testimony makes clear that Mrs. Behar had no knowledge of the false statements or the false employment. The giving of the employment verification forms was clearly without any criminal intent.

The government also faults Mrs. Behar for suggesting to Kapraki that employment which generated greater income be listed prior to other employment which generated lesser income (Gov. Br., p. 98). Again, there was clearly no motivation to hide or falsify anything. The obvious intent was to call to the FHA's attention the more substantial income.

* Appellant Behar's Brief, Point V, p. 49; Gov. Br., Point VIII at p. 130-1.

him or another would be an offense against the United States, is punishable as a principal."

See: United States v. Levine, 457 F. 2d 1186, 1188-9 (10th Cir., 1972).

It is clear that if Cardona willfully caused false statements to be submitted via Mrs. Behar and Eastern Service, Cardona was, in fact, a principal.* Under the government's present theory, if Cardona and Kapraki submitted the false statements through an actually innocent instrumentality, they could not be found guilty of anything. That contention is absurd.

Apparently recognizing the illogic of its contention, the government again falls back upon its claim that "this jury was very sophisticated". The fact that the jury convicted Mrs. Behar on the one false statement count in which Cardona was not named reveals only that it was consistent. Having been compelled to place the mark of criminality upon Mrs. Behar's forehead in order to convict Cardona, there would have been little sense in removing that mark for the purpose of one count.

---

* At C. 681, the defendant Cardona's counsel took exception to the peculiar theory of liability now advanced by the government as being correct: "I respectfully except to Your Honor's remarks concerning reckless disregard and continued indifference, in behalf of Melvin Cardona, who the government has always contended had actual knowledge and who the government contends or as to [whom] the government contends those elements of reckless disregard and conscious avoidance did not apply.

POINT VI

THE COURT SHOULD HAVE INSTRUCTED THE JURY THAT THE DEFENDANT BEHAR'S "CONSCIOUS AVOIDANCE" OR "RECKLESS DISREGARD" COULD NOT BE USED AS A BASIS FOR CONSPIRATORIAL LIABILITY.

The government concedes that the principals of knowledge embodied in United States v. Crimmins, 123 F. 2d 271, 273 "are still applicable to elements as to which knowledge is still required in a conspiracy count (Gov. Br., fn. at 125). The government argues, however, that "continued indifference" to the truth or falsity of the statements in the applications, "coupled with the knowledge that in some cases the statements were false, is sufficient to establish this element of the offense." (Gov. Br., p. 126). The problem, never answered by the government, is that there was no showing that Florence Behar had any "knowledge that in some cases the statements were false". The government also argues that the knowledge requirement can be satisfied if the defendant is "aware of a high probability that false statements would be included" or knows "that the likelihood of false statements was great" or "agreed to participate in a scheme which by its very nature would include false statements". None of these factors was established in the present case. There was nothing shown to have been known by Mrs. Behar "which by its very nature would include false statements".

In short, the government has parroted a number of different legal theories of liability without connecting them to the facts of this case insofar as Mrs. Behar is

concerned. We are left with the uncontested fact of Kapraki's testimony that Mrs. Behar never knew of the false nature of any of the statements and that every effort was utilized to keep that knowledge from her. It is truly difficult to understand how, under any theory, Florence Behar can be held to have joined with others in a conspiracy predicated upon the government's theory of her participation in this case.

Conclusion

The appellant Behar presses the arguments contained in Points VII and VIII of her main brief. The Government's Brief has utterly failed to meet the issues raised by those Points, all of which were clearly prejudicial to Mrs. Behar.

For all of the above reasons, the judgment of conviction should be reversed, and the indictment should be dismissed. In the alternative, the appellant Behar should be granted a new trial.

Respectfully submitted,

HENRY J. BOITEL
Attorney for Appellant
Florence Behar

June 2, 1975

Certificate of Service

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York and a member of the Bar of this Court hereby certifies that on June 2, 1975 he served two (2) copies of the Reply Brief in Behalf of Appellant Florence Behar upon the United States Attorney for the Eastern District of New York,225 Cadman Plaza East, Brooklyn, New York 11201, attorney for Appelleee herein, by depositing same in a postpaid wrapper in an official depository of the United States Post Office Department within the State of New York.

HENRY J. BOITEL

June 2, 1975